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Issue Date: 06 November 2006

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In the Matter of

B.B.[1]
Claimant

Case No. 2005 LHC 02044
OWCP No. 6-184754

v.
SOUTHERN MAINTENANCE & REPAIR;
U.S. FIRE INSURANCE COMPANY
Employer/ Carrier
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest
…….

Decision and Order

This matter arises pursuant to a claim for benefits under the Longshore Act filed by B.B. of Jacksonville, Florida. Claimant was injured on February 23, 2001, when he fell from a ladder at work and injured his left knee. Tr 9-10. At a prior hearing in this matter, Judge Malamphy decided that U.S. Fire was the appropriate carrier, Tr. 11. Ex 6, tab 46, but that compensation issues were not ready for adjudication. Tr. 13. In this proceeding, Claimant seeks compensation for temporary total disability to the date of maximum medical improvement (MMI), which he insists occurred on October 24, 2005, and, thereafter, permanent partial disability for a 50% impairment of the left lower extremity. Tr. 15. Employer responds that it paid compensation based upon a 20% disability assigned by Claimant's treating physician on February 11, 2004, Tr. 29, and it challenges the MMI date and the degree of impairment Claimant now seeks. Employer contends that if the MMI date is moved forward then vocational evidence need be

[1] Beginning on August 1, 2006, the Department of Labor has mandated that decisions rendered in Black Lung Benefits Act and Longshore and Harbor Workers' Compensation Act cases shall no longer display the claimant's full name in the decision or in the caption.

considered because Claimant's disability was temporary partial based upon his wage earning capacity since August, 2004. Tr. 32-33. Employer also interposes a defense under Section 8(f) of the Act if the degree of disability found in this proceeding results in compensation under the schedule that exceeds 104 weeks. Tr. 45-46. The parties agree that Claimant's average weekly wage is $1,304.56 Tr. 70.[2]

Medical Evidence

Claimant sustained a left knee injury at work on February 23, 2001, when he fell three or four feet off a ladder, landing on his left foot and jamming his left knee. He continued to work that day then rested over the weekend, but had problems at work the next week. He was referred to a clinic for x-rays which were taken and interpreted as negative. After several days of discomfort, he was eventually referred to Dr. Stephen Lucie.

The record shows that Dr. Lucie, an orthopedic surgeon, has been Claimant's treating physician since the early 1980's. He prepared reports, Cx1, and was deposed twice; once on May 10, 2004, Ex 3, and again on December 12, 2005. Cx 2.[3]

On March 26, 2001, at the Carrier's request, Dr. Lucie reviewed Claimant medical history, including his own treatment of Claimant's post-traumatic degenerative arthritis involving several arthroscopic surgeries and a proximal osteotomy in 1995. Dr. Lucie also examined Claimant and took an x-ray which revealed loss of medial joint space, osteophyte formation, and calcification within the knee joint consistent with loose bodies. He diagnosed post-traumatic arthritis in the left knee and treated the condition by aspirating fluid from the knee joint followed by an injection of Marcaine. Dr. Lucie attributed Claimant's condition to "an aggravation of a pre-existing condition," the extent of which he could not determine at the time; but he released Claimant to return to work on March 28, 2001, with a recommendation that Claimant return for a follow-up visit in four weeks. CX 1.

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[2] The parties have stipulated further that an order should issue which designates Dr. Lucie as Claimant's authorized treating physician; that therapy should be approved if Dr. Lucie recommended it, Tr. 27, that the Carrier will satisfy a lien for medical care provided by Claimant's health insurance carrier, Cigna's; Carrier will pay mileage for 578.54 miles at a rate of 30 cents per mile plus simple interest at a rate of 2.27% from November 18, 2004 until paid; the carrier will pay simple interest at a rate of 2.27% on $918.00 from November 18, 2004, to July 15, 2005. Tr. 37-39.

[3] Dr. Lucie's December 12, 2005, deposition was submitted post-hearing and is hereby admitted into evidence as Cx 2.

On April 16, 2001, Claimant returned to Dr. Lucie. Dr. Lucie noted that Claimant was still experiencing discomfort but had reached a "fairly steady state." Dr. Lucie noted that he did: "not feel that this is a permanent aggravation at the present time," and that he had anticipated that Claimant would have intermittent aggravations "such as this." Dr. Lucie observed further that Claimant needs a knee replacement related "more to his original problems than to this most recent aggravation." Cx 1.

On May 7, 2001, Claimant returned to Dr. Lucie complaining of pain in the left knee which he had twisted at work. An x-ray showed no significant change, but the knee was again aspirated. By May 17, Claimant was still out of work. Dr. Lucie noted that "this aggravation of his pre-existing condition has persisted," and required an arthroscopy and cleanout. CX 1. *See also* letter dated June 7, 2001. CX 1. Dr. Lucie performed the arthroscopy with menisectomy and thermal chondroplasty on July 3, 2001. Following a period of recover and therapy, Dr. Lucie released Claimant to return to light duty, sedentary work on August 1, 2001. Cx 1.

During an office visit on September 19, 2001, Claimant expressed his desire to return to his regular job, and Dr. Lucie agreed to release him to work at his regular job "on a trial basis" as of October 1, 2001. Cx 1. Claimant did return to work, but by November 17, 2001, Dr. Lucie noted that Claimant was having considerable difficulty working as a refrigeration mechanic and his knee was swelling. On January 16, 2002, Dr. Lucie aspirated 60cc of fluid from the knee.

Claimant's work continued to cause fluid build-up and pain. Dr. Lucie aspirated 45 cc of fluid on May 15, 2002, and administered the first of three Hyalgan injections. He placed Claimant on three weeks of temporary total disability which he thereafter extended until June 12, 2002. Claimant again tried to return to work, but by July 3, 2002, he returned to Dr. Lucie in severe pain, and Dr. Lucie again recommended a total knee replacement. CX 1. Dr. Lucie noted further that Claimant could no longer perform his usual job duties requiring him to bend, kneel, and squat. He thought, however, that there might be some other job Claimant would be able to perform "following a knee replacement," but opined further that: "We have to take [it] job by job as we go forward." Cx 1.

In a letter dated October 16, 2002, Dr. Lucie opined that the February 23, 2001 injury aggravated Claimant's pre-existing condition, but "the majority of the

reason and problems which now require a total knee replacement predated the injury in February of 2001."

By May 12, 2003, Dr. Lucie was preparing to schedule Claimant for total knee replacement surgery which he performed on August 5, 2003. Cx1; Cx 2 at 10. Following a period of recuperation and therapy, Dr. Lucie, on December 3, 2003, placed Claimant at maximum medical "benefit," but his therapy continued. Cx 1. On February 11, 2004, Dr. Lucie stated that Claimant was "reaching a steady state of maximum medical improvement (MMI)," and rated Claimant with a 20% permanent physical impairment. Cx 1; Cx 2 at 10. He opined that Claimant was unable to return to his job as a longshoreman, and released him to return to sedentary work with restrictions including, standing and walking to standing two hours, working two hours with a sitting break, standing up to four hours with an hour break, no squatting or kneeling, or climbing on a routine basis, lifting 50 pounds frequently or 75 pounds total. Cx 1.

Claimant, thereafter, visited Dr. Lucie periodically for increasing problems related to the knee replacement, and on December 1, 2004, Dr. Lucie aspirated 40cc of fluid, and ordered a bone scan to determine whether the knee was loosening. Cx1. The scan and subsequent x-ray were negative, but Dr. Lucie was concerned that some micro motion could be taking place at the tibial interface site. Cx1. Claimant continued to experience pain and swelling with increased movement, and Dr. Lucie continued to monitor the problem. On September 12, 2005, he ordered more therapy for the left knee. Cx 1.

Following additional treatment and therapy, Dr. Lucie, on October 24, 2005, rated Claimant at 50% permanent partial impairment referable to the left lower extremity which translates to 20% of the whole person. Cx 1; Cx 2 at 10.

Dr. Lucie's First Deposition

In his May 10, 2004 deposition, Dr. Lucie reviewed his treatment history relating to Claimant's left knee dating back to October 10, 1983. Ex 3 at 7. He initially treated Claimant conservatively for a twisted knee resulting from a slip accident, but later performed surgery for a torn medial meniscus. Ex 3 at 8-9. In 1984, Claimant underwent injection therapy and an x-ray showed he had 50% loss of cartilage on the inside portion of his knee. Ex 3 at 9-10. Dr. Lucie performed surgeries again in 1985, 1986, and 1987. On May 3, 1988, Dr. Lucie placed Claimant at "maximum medical benefit" and rated him at a 30% impairment of the

left knee; 12% of the whole person, which was paid by Claimant's previous employer. Ex 3 at 11-12.

Claimant's problems continued, however, and Dr. Lucie treated them by removing fluid and administering injection therapy as Claimant's condition waxed and waned. Ex 3 at 12-15. By 2000, Dr. Lucie raised the possibility of a total knee replacement, because the x-rays of Claimant's knee revealed additional cartilage loss. Ex 3 at 15-16. Claimant, however, opted for Synvus injections rather than surgery because he was not ready to give up the type of work he was doing and Dr. Lucie did not believe Claimant would be able to return to work after total knee replacement surgery. Ex 3 at 17-18. Dr. Lucie testified further, however, that "it was inevitable that he was going to need the total knee replacement." Ex 3 at 18.

Dr. Lucie evaluated Claimant after the February 23, 2001 accident. Ex 3 at 19. As he later confirmed at his second deposition, Cx 2, he determined that Claimant had aggravated his pre-existing condition. Ex 3 at 20. Dr. Lucie saw Claimant on April 16, 2001, and acknowledged that he initially opined that the aggravation was not permanent, and he thought Claimant had returned to his steady state or baseline condition. Ex 3 at 21-22. Several weeks later, however, on May 7, 2001, Claimant returned with 60 ccs of "bloody fluid" in his knee, and Dr. Lucie re-evaluated his assessment: "We stated that it appeared that his aggravation of his pre-existing condition persisted and it appeared that perhaps it had been a direct cause and result of us needing to go back in and do a complete clean out." Ex 3 at 22; 27; 31. Thereafter, Claimant continued to experience problems and Dr. Lucie continued to treat him. Ex 3 at 23-24.

Eventually, Dr. Lucie performed the total knee replacement on August 5, 2003. He later explained that he would have performed it much sooner, but Claimant wanted to continue working as long as he could. Ex 3 at 25. Following surgery, he did not believe Claimant could return to his job as a longshoreman, but sedentary work "would be fine for him." Ex 3 at 26.

On February 11, 2004, he rated Claimant at 20% impairment of the whole body; 49% of the lower extremity. Ex 3 at 28-29. He attributed the need for the total knee replacement to the original injury and meniscectomy, Claimant's occupation, a pre-existing mal-alignment of his extremity, Ex 3 at 29, 31 and opined that even in the absence of the 2001, injuries, Claimant still would have required a total knee replacement, but the incidents "accelerated the need for the knee replacement." Ex 3 at 29-31. Dr. Lucie opined that the work-related injuries

in 2001 produced a 2% permanent impairment and loss of physical function referable to the body as a whole. Ex 3 at 33.

Dr. Lucie's Second Deposition

In his December 12, 2005 deposition, Dr. Lucie again reviewed his treatment history and noted that he rated Claimant at MMI on March 5, 1988, at 30% permanent left knee impairment; 12% of the whole person under the AMA Guides but Claimant had no physical limitations. Cx 2 at 7, 9. He believed that Claimant returned to his usual work in 1987, and was released for full duty on February 18, 1988. Cx 2 at 8.

Dr. Lucie explained that the rating on February 11, 2004 indicated that Claimant was a approaching "a steady state" but continued to experience increasing problems. Cx 2 at 11, 13. He described Claimant's condition as "not deteriorating," but waxing and waning. Dep at 24-25. After the post-knee replacement surgery he eventually improved to a "steady state" again, Dep at 12, and Dr. Lucie rated Claimant at 50% impairment of the left lower extremity. Cx 2 at 24. Dr. Lucie explained further that Claimant's current 50% rating "incorporates" the previous 30% rating, it does not add to it. Cx 2 at 15.

Dr. Lucie confirmed that the February 23, 2001 injury aggravated Claimant's pre-existing condition, but that Claimant was a candidate for total knee replacement surgery even before the accident. Cx 2 at 14. In May of 2000, Claimant had 95% loss of cartilage on the medial side. Cx 2 at 14-15; 22.

Vocational Evidence

Beverly Brooks, a rehabilitation specialist, prepared a vocational rehabilitation report dated July 29, 2004. Tr. 51. At the time, she had not yet interviewed Claimant, Tr. 51, but she did later meet with him on September 14, 2005. Tr. 50. Her report and evaluation, however, were based upon a review of Claimant's deposition which discussed his job as a refrigeration mechanic and the type of work he did, his skills, experience, educational background, and transferable skills and physical restrictions. Tr. 51-53; 55;57; 63. She determined that Claimant could not return to his job as a refrigeration mechanic. Tr. 64.

Ms. Brooks conducted a labor market survey on August 2, 2004. Ex 15. Each position she identified was, in her opinion, consistent with Claimant's

restrictions. Tr. 53. Her subsequent interview and testing of Claimant did not eliminate any of the jobs she had previously identified as suitable. Tr. 54.

In a subsequent survey, Brooks identified additional jobs. Tr. 54-55. Several of the jobs were sedentary, and she noted that Claimant could lift up to 75 pounds. Tr. 55. Although she submitted none of the jobs to Dr. Lucie for his approval, Tr. 56, Dr. Lucie did clarify his restrictions at her request. Tr. 55.

Ordinarily, Brooks relies upon employers to describe the sitting and standing requirements of their jobs. Tr. 60. Commenting on a few of the jobs, she understood that Claimant was restricted regarding driving a truck with a clutch, Tr. 60, but she determined that the job at Hood Ice Cream driving a truck did not require use of a clutch, Tr. 61-62; for the job at Ranstat she noted that the employer would provide training, Tr. 56; for the job at TRC Staffing involving export reseller training, she did not determine if Claimant was qualified for the position, Tr. 58-59; and for the job as shop supervisor at Techmaster, she determined that the walking and standing requirements were consistent with claimant's restrictions. Tr. 62-63.

Brooks testified that the availability dates for the jobs listed on her labor market surveys all commenced at least three months before her surveys. Tr. 64-66.

At his second deposition, Dr. Lucie confirmed that the restrictions he assigned in February, 2004, remained the same. Cx 2 at 16. He then reviewed the jobs listed on Ex 15 and 16, and testified that a number of jobs identified by Brooks were not appropriate for Claimant, including several sales positions, parts clerk, hotel bellman, and door-to-door sales. Cx 2 at 17-19. He did, however, identify several jobs he considered appropriate for Claimant, including: Certified Security Systems, Cx 2 at 18, appointment setter at unspecified salary and available as of May 2, 2004, Ex 15; BJ Wholesale Club, Cx 2 at 19, security officer at $8.00 to $10.00 per hour and available as of May 2, 2004, Ex 15; St. Nicholas Gun and Sporting Goods, Cx 2 at 19, sales clerk at $6.50 to $7.00 par hour and available as of May 2, 2004, Ex 15; Renaissance Center, security officer at $8.58 per hour and available as of May 2, 2004, Ex 15; Lucas Honda, Cx 2 at 20, cashier at $8.00 per hour and available as of May 2, 2004, Ex 15; Dollar Rent-a Car, customer service rep at $7.25 per hour and available as of May 2, 2004, Ex 15; Bostwain's Locker, receptionist at $8.00 to $12.00 DOE, and available as of June 29, 2005, Ex 16; Randstad, control clerk at $8.00 per hour and available as of June 29, 2005, Ex 16; and Coggin Automotive, Cx 2 at 21, receptionist at $8.00-$12.00 per hour and available as of June 29, 2005, Ex 16.

Discussion

MMI

The threshold issue in dispute is the date Claimant reached MMI. Employer argues that Claimant reached MMI on February 11, 2004, when Dr. Lucie determined that he was "approaching his steady state of maximum medical improvement," but it continued to pay him temporary total benefits until its labor market survey was complete on August 2, 2004, and it converted his benefits to permanent partial under the schedule. Claimant insists that he reached MMI on October 24, 2005.

The record shows that, following a period of recuperation and therapy after the knee replacement surgery, Dr. Lucie, on December 3, 2003, placed Claimant at maximum medical "benefit," but his therapy continued. On February 11, 2004, Dr. Lucie stated that Claimant was "reaching a steady state of maximum medical improvement (MMI) from a rating standpoint," and he rated Claimant with a 20% permanent physical impairment and unable to return to his job as a longshoreman. He did, however, release Claimant to return to sedentary work with restrictions including, standing and walking to standing two hours, working two hours with a sitting break, standing up to four hours with an hour break, no squatting or kneeling, or climbing on a routine basis, lifting 50 pounds frequently or 75 pounds total. As the record confirms, however, each of these MMI evaluations were forward-looking and premature, as subsequent events would amply demonstrate.

Claimant periodically visited Dr. Lucie, after February 11, 2004, for increasing problems related to the knee replacement. Indeed, on December 1, 2004, Dr. Lucie aspirated 40cc of fluid, and ordered a bone scan to determine whether the knee was loosening. The scan and subsequent x-ray were negative, but Dr. Lucie was concerned that some micro motion could be taking place at the tibial interface site. Claimant continued to experience pain and swelling with increased movement, and Dr. Lucie continued to monitor the problem. On September 12, 2005, he ordered more therapy for the left knee, and it was not until October 24, 2005, that Dr. Lucie propounded his final rating Claimant following the knee surgery placing Claimant at 50% permanent partial impairment referable to the lower extremity that translates to 20% of the whole person.

Dr. Lucie explained that the rating on February 11, 2004, indicated that Claimant was approaching "a steady state" but continued to experience increasing problems. He described Claimant's condition as "not deteriorating," but waxing

and waning; yet the record shows that Claimant's "increasing problems" had reached a level of discomfort sufficient to suggest to Dr. Lucie that there may have been micro-movement in the knee replacement apparatus. Eventually, however, Claimant's condition stabilized after therapy to a level sufficient to permit Dr. Lucie to re-evaluate the situation and determine that Claimant had reached a post-surgery steady state on October 24, 2005, with a 50% permanent partial impairment of the left lower extremity.

Under these circumstances, it appears that the February 11, 2004, impairment rating was a premature assessment of an individual who may have been "approaching" MMI but had not actually achieved it. Thus, the MMI assessment in February of 2004 was anticipatory and was not substantiated by unfolding events. To be sure, Dr. Lucie indicates that Claimant's condition did "not deteriorate" after February 11, 2004; however, Dr. Lucie's treatment records confirmed that Claimant had not yet fully healed from the surgery. Indeed, Dr. Lucie reported that Claimant's condition did not merely wax and wane; he experienced "increasing problems," to the extent that additional diagnostic work was ordered to determine if the surgical repairs had loosened. They had not, but Claimant still required additional therapy and an additional period of recuperation before he reached MMI. In this instance, Dr. Lucie ultimately determined that Claimant reached MMI on October 24, 2005, with a 50% impairment of the left lower extremity, and upon consideration of the record viewed in its entirety, I find and conclude that October 24, 2005, is the date of MMI.

Temporary Partial Disability

Although Claimant had not reached MMI by February 11, 2004, Dr. Lucie released him for light duty work on that date, with restrictions that clearly prevented him from returning to his job as a refrigeration mechanic. Consequently, Claimant was temporarily and totally disabled, for which Employer paid compensation, until Employer produced a labor market survey on August 2, 2004, which identified suitable alternate employment for Claimant. That survey revealed several jobs that could perform, considering his age, education, experience, and physical restrictions, and Employer converted Claimant's benefits to permanent partial the next day.

As determined above, however, Claimant had not yet reached MMI, and accordingly, the conversion of his benefits to permanent in nature was premature. Thus the question is whether, during the period August 3, 2004, until October 24, 2005, the date of MMI, Claimant was entitled to benefits for continuing temporary

total disability or temporary partial disability benefits based upon a loss of wage earning capacity during this period.

Suitable Alternate Employment

In this proceeding, Claimant has demonstrated that his injuries prevent him from returning to his job as a refrigeration mechanic, and accordingly Employer must demonstrate the availability of "suitable alternate employment," New Orleans Stevedores v. Turner 661 F.2d 1031 (5th Cir. Nov. 1981); P&M Crane Company v. Hayes 930 F.2d 424 (5th Cir. 1991); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988; Diaosdado v. John Bloodworth Marine, 29 BRBS 125 (9th Cir. 1996); Hairston v. Todd Shipyards Corp., 21 BRBS 122 (CRT) (9th Cir. 1988); Palombo v. Director, 937 F.2d 70 (2d Cir. (1991).

Now, an employer's burden in establishing suitable alternative employment has not yet been addressed by the Eleventh Circuit. It has, however, been considered by the First, Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits, and the D.C. Circuit, and the guidance provided is mixed. Air America, Inc. v. Director, 597 F.2d 773 (1st Cir. 1979); Argonaut Ins. Co. v. Director, 646 F.2d 710 (1st Cir. 1981); Palombo v. Director, 937 F.2d 70 (2nd Cir. 1991); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3rd Cir. 1979); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988); Tann v. Newport News Shipbuilding and Drydock Co., 84 F. 2d 540 (4th Cir. 1984); Universal Maritime Corp. v. Moore, 126 F. 3d 256 (4th Cir. 1997);P&M Crane Company v. Hayes, 930 F.2d 424 (5th Cir. 1990); Rogers Terminal and Shipping v. Director, 784 F.2d 687 (5th Cir. 1986); New Orleans Stevedore's v. Turner, 661 F.2d 1031 (5th Cir. 1981); Diosdado v. John Bloodworth Marine, 37 F.3d 629 (5th Cir. 1994); Bunge v. Carlisle, 227 F.3d 934 (7th Cir. 2000); Stevens v. Director, 909 F.2d 1256 (9th Cir. 1990); Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988).

In the First Circuit, for example, an employer need not prove the existence of actual available jobs when it is "obvious" that jobs are available for someone with the claimant's age, education, and experience. *See*, Air America, *supra*. In contrast, Diosdado indicates that one job is insufficient as a matter of law to satisfy the employer's burden. Similarly, in Lentz, the court held that the identification of a single job opening as an elevator operator does not satisfy the "suitable alternative employment" standard. The rationale in Lentz suggests it would be unreasonable to expect an illiterate Claimant to seek out and secure one specific

job. Hairston further suggests that it is not sufficient to point to general work a Claimant may be physically able to perform. In the Ninth Circuit, the employer must identify specific suitable jobs. Under Hayes and Turner, Employer need only demonstrate that there were jobs reasonably available within Claimant's capabilities and as few as one or two available jobs within Claimant's specific capabilities. I note further that the Second Circuit in Palombo cited with approval, the limited burden Turner imposes upon the employer. At the opposite pole of appellate reasoning, the Fourth Circuit in Moore held that an employer may, in assessing job requirements, simply rely on the general job descriptions found in the Dictionary of Occupational Titles and need not contact employers to determine the actual requirements of an available job or whether the employer would hire someone with claimant's vocational profile. Guided by these diverse pronouncements, we turn to the jobs that Employer considered available and suitable for Claimant.

Beverly Brooks, a rehabilitation specialist, prepared a vocational rehabilitation report dated July 29, 2004, and conducted a labor market survey on August 2, 2004. Each position she identified was, in her opinion, consistent with Claimant's restrictions. Her subsequent interview and testing of Claimant did not eliminate any of the jobs she had previously identified as suitable. In a subsequent survey, she identified additional jobs. Although Claimant could lift up to 75 pounds, several of the jobs were sedentary. The record shows that she submitted none of the jobs to Dr. Lucie for his approval, but Dr. Lucie was afforded an opportunity to review the jobs in light of Brooks' reports and the restrictions he placed upon Claimant and he confirmed that many of the jobs were suitable for Claimant.

Indeed, after confirming that confirming that the restrictions he assigned in February, 2004, remained the same, Dr. Lucie testified at his second deposition that he reviewed the jobs listed on the labor market surveys that he considered the following jobs appropriate for Claimant: Certified Security Systems, appointment setter at unspecified salary and available as of May 2, 2004; BJ Wholesale Club, security officer at $8.00 to $10.00 per hour and available as of May 2, 2004; St. Nicholas Gun and Sporting Goods, sales clerk at $6.50 to $7.00 par hour and available as of May 2, 2004; Renaissance Center, security officer at $8.58 per hour and available as of May 2, 2004; Lucas Honda, cashier at $8.00 per hour and available as of May 2, 2004; Dollar Rent-a Car, customer service rep at $7.25 per hour and available as of May 2, 2004; Bostwain's Locker, receptionist at $8.00 to $12.00 DOE, and available as of June 29, 2005; Randstad, control clerk at $8.00 per hour and available as of June 29, 2005; and Coggin Automotive, receptionist at

$8.00-$12.00 per hour and available as of June 29, 2005. The record thus demonstrates that these jobs were available to Claimant on August 3, 2004 and were suitable considering both his vocational factors and his physical condition and restrictions. Further, since there is no evidence in the record that demonstrates that Claimant diligently tried and reasonably failed to obtain alternate employment, *See,* Palombo*, supra;* Williams v. Halter Marine Services, 19 BRBS 248 (1987), Employer has successfully established the availability of suitable alternate employment.

The data further show that, although several of the jobs included hourly rates higher than $8.00 per hour, depending on experience (DOE), the record fails to show that Claimant had the necessary experience to command the higher wage. His realistic post-injury wage earning capacity is, therefore, $8.00 per hour, the wage paid by a majority of the suitable jobs, or $320.00 per week.

Accordingly, for all of the foregoing reasons, I conclude that Claimant's disability was temporary and partial and, for the period commencing August 2, 2004, until October 23, 2005, Claimant is entitled to temporary partial disability compensation based upon a loss of wage earning capacity amounting to $984.56. (AWW: $1304.56 – WEC: $320.00 = $984.56).

Scheduled Award

As discussed above, Claimant is unable to return to his usual job as a refrigeration mechanic. He does, however, retain a residual wage earning capacity, notwithstanding the disability caused by the injury and subsequent knee replacement surgery, and, as a consequence, a scheduled award is proper notwithstanding the amount of loss of wage earning capacity. *See*, Rowe v. Newport News Shipbuilding and Drydock Co., 193 F.3d 836 (4th Cir. 1999); Sketoe v. Dolphin Titan Int'l, 28 BRBS 212 (1994); Southern v. Farmers Export Co., 17 BRBS 64(1985). As long as suitable alternative employment is reasonably available to Claimant, whether he earns at or near his average weekly wage or merely earns the minimum wage, the schedule applies. *See*, Pepco v. Director, 449 U.S. 268, 273,281-83 (1980).[4]

[4] In Pepco v. Director, the Supreme Court discussed the effects of applying the schedule:

> It is true, however, that requiring resort to the schedule may produce certain incongruous results. Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled

Since the record, as discussed above, demonstrates that alternate employment was available to Claimant which was suitable considering his physical restrictions as confirmed by Dr. Lucie in his post-MMI deposition, I conclude that Claimant's disability due to the knee injury is permanent and partial as of October 24, 2005, and that Claimant must be compensated in accordance with Section 8(c)(2) of the schedule for a 50% permanent partial impairment of the left lower extremity. *See*, Pepco v. Director, 449 U.S. 268, 273, 281-83 (1980); Jacksonville Shipyards v. Dugger, 587 F.2d 197 (5th Cir. 1979).

Interest and Penalties

20% Penalty
Judge Malamphy's Order

Claimant alleges that his benefits were terminated on January 8, 2003, and were not resumed until November 23, and November 27, 2004. He claims interest on the delayed payments, and a 20% penalty with interest because the payments were, according to Claimant, due under an award issued by Judge Malamphy on September 14, 2004. Cl. Br. at 9. The record shows, however, that Judge Malamphy specifically commented that he was not deciding compensation issues. Accordingly, his decision and order designating merely who was liable for Claimant's benefits did not amount to a compensation order. *See*, Severin v. Exxon Corp., 910 F.2d 286, (5th Cir. 1990); Keen v. Exxon Corp., 35 F.3d 226, (5th Cir. 1994).

Claim's Examiner's Conference Memorandum

Subsequently, the matter was taken up by the claims examiner. On November 9, 2004, the claims examiner issued a conference memorandum in which it was recommended that Claimant be paid for temporary total disabled from

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> injury may have no actual effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid. Conversely, the schedule may seriously undercompensate some employees like respondent Cross. The result seems particularly unfair when his case is compared with an employee who suffers an unscheduled disability resulting in an equivalent impairment of earning capacity. Indeed, it is possible that the award for a serious temporary partial disability could exceed the amount scheduled for a permanent disability of like character. Potomac Electric Power Co. v. Director, 449 U.S. 268, 283 (1980)

January 9, 2003, to November9, 2004, and continuing; and, in addition, be paid interest and a 10% penalty. The memorandum noted further that, in the event of controversion, Employer was to file an LS-207; however, Employer notes that it accepted the claims examiner's recommendations, except for the interest and penalty portions, and paid compensation timely thereafter. Nevertheless, upon review, the record does not indicate that an LS-207 was filed with respect to any issue raised in the conference memorandum.

In his Reply Brief, Claimant emphasizes that following the claims examiner's recommendations, he received two checks, one in the amount of $70,943.49 on November 23, 2004, and one in the amount of $5,734.78 on November 27, 2004; and neither were, according to Claimant, timely received within either the 10 days following the award or within 14 days for voluntary payments. He, therefore, demands that the 20% penalty be applied to the temporary total compensation benefits and interest he should have received. Cl. Br. at 10.

Initially, it should be noted that the Section 14(f) assessment applies to awards entered the district director. McKamie v. Transworld Drilling Co., 7 BRBS 315, 319 (1977). In this instance, however, it is clear that the informal conference memorandum issued under Section 702.316 of the regulations, not Section 702.315(a). The claims examiner specifically advised the parties that, in the event of controversion, an LS-207 had to be filed, and in bold print the memorandum afforded the parties 14 days to respond to the recommendations. As a result, the parties had 14 days to agree to the recommendations or lodge their disagreements.

Once Employer accepted the conference memorandum which issued under Section 702.316, the matter was, as previously mentioned, processed under Section 702.315(a).[5] Either party at that time could have requested that an order issue in lieu of the memorandum; however, neither party made such a request. As a result, an order did not issue; and accordingly, it would appear that a penalty under Section 14(f) of the Act would be inappropriate.[6]

[5] In contrast, under Section 702.315(a), a memorandum may issue in lieu of an order unless a compensation order is specifically requested by a party, and the regulation requires that compensation benefits be restored "immediately."

[6] It should be noted that assuming the conference memorandum were construed as an "award," the date of the memorandum would not be the operative date for purposes of applying a Section 14(f) penalty. The memorandum was dated November 9, 2004, and afforded the Employer 14 days to respond. The Employer apparently agreed to resume payment of benefits ten days later on November 19, 2004. Thereafter, payment of compensation would be due in ten days, or by November 29, 2004. Since Claimant acknowledges that he received payments on the 23rd and

Interest

Claimant is, however, entitled to interest on the past due benefits he received untimely. Indeed, while Employer cites Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904 (5th Cir. 1997) for the proposition that interest is not due from the date of injury, the Wilkerson citation is not instructive. In this instance, benefits accrued and remained unpaid while the Employer litigated whether it was the party responsible and liable for Claimant's Longshore benefits. When its liability was clarified by Judge Malamphy, Employer paid the past due, accrued compensation, but apparently failed to pay the interest on the benefits that had accrued while the identification of the party liable for the benefits was adjudicated. Under these circumstances, the Board has held that interest is mandatory under the Act, not from the date of injury, but on all unpaid benefits which had accrued; and it is calculated on a simple, not compound, basis. Canty v. S.E.L. Maduro, 26 BRBS 147 (1992); Jones v. U.S. Steel Corp., 25 BRBS 355 (1992); Smith v. Ingalls Shipbuilding Division, Litton Systems Inc., 22 BRBS 46 (1989). Accordingly, commencing January 9, 2003, interest is owed from the date each past benefit payment was due until the date it was paid. In addition, Claimant is entitled to additional interest on the unpaid interest that accrued on the unpaid benefits.

10% Penalty

It is clear that Claimant is also entitled to the 10% penalty on the compensation he received untimely. *See*, Cox v. Army Times Publishing Co., 19 BRBS 195, 198 (1987); Browder v. Dillingham Ship Repair, 25 BRBS 88, 90-91 (1991); Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592, 595 (1980); Alston v. United Brands Co., 5 BRBS 600, 607 (1977); Ramos v. Universal Dredging Corp., 15 BRBS 140, 145 (1982). He is, however, also entitled to the 10% penalty on unpaid interest.

Employer admits in its post-hearing brief that, ten days after the claims examiner issued his recommendations, Employer accepted them, but Employer argues that it did not accept "the payment of interest and penalties." Yet, neither Employer exhibits or Claimant's exhibits introduced into evidence at the hearing contain an LS-207 or other document indicating that Employer controverted Claimant's entitlement to interest on accrued, unpaid compensation. This record,

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27th of November, 2004, a 20% penalty based upon the conference memorandum would not be warranted even if the conference memorandum were deemed an "award."

therefore, does not reflect that Employer either timely paid or timely controverted that interest was due, and accordingly, the Section 14(e) penalty applies to the interest owed on the accrued but unpaid benefits as well as the interest that accrued on the unpaid interest set forth in the conference memorandum. Sproull v. Director, 86 F.3d 895, (9th Cir. 1996), cert. denied, U.S., 117 S.Ct. 1333 (1997)(Overdue interest payments are "compensation").[7]

Penalties on Out-of-Pocket
Medical Expenses and Mileage

Claimant further demands a 10% penalty for his out-of-pocket medical expenses totaling $918.00, and $173.56 in mileage. The Board has held that the penalty set forth in Section 14(e) of the Act applies to unpaid compensation installments, not unpaid medical benefits or, by analogy, unpaid mileage. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989); *See also*, Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, 8 F.3d 29 (9th Cir. 1993)(denying a Section 14(f) assessment on unpaid medical benefits as well). The penalty Claimant seeks will, therefore, be denied.

Credit for Pre-Existing
Permanent Partial Disability

In its post-hearing brief, Employer emphasizes that Claimant sustained a pre-existing 30% permanent partial impairment to the left knee and received a scheduled award for that injury from his previous employer, Puerto Rico Marine. Employer thus argues, citing Bracey v. John T. Clark & Sons, 12 BRBS 110 (1980), that, and assuming Claimant's impairment is now 50%, Employer is entitled to subtract the pre-existing 30% impairment from the current 50% impairment, and thus must pay compensation under the schedule only for the

[7] Interest is not due on a Section 14(e) assessment. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, 8 F.3d 29 (9th Cir. 1993); Cox v. Army Times Publishing Co., 19 BRBS 195 (1987). Conversely, interest is assessed on amounts due under Section 14(f). *See*, McKamie v. Transworld Drilling Co., 7 BRBS 315, 320 (1977). Barry v. Sea-Land Services, Inc., 27 BRBS 260, 265 (1993).

remaining 20% impairment. Emp. Br. at 12. Employer's claim of entitlement to a credit is correct, in principle; but it miscalculates the amount of its entitlement.

Contrary to Employer's assertions, Claimant's scheduled award here is not reduced by his pre-existing 30% left knee impairment to a mere 20% permanent partial scheduled disability. Despite the holding in Bracey, more recent precedents limit Employer's credit, not to the percentage of the pre-existing impairment, but to the dollar amount Claimant actually received for his previous permanent partial scheduled award. Director v. Bethlehem Steel Corp., 868 F.2d 759, (5th Cir. 1988); Von Lindenberg v. I.T.O. Corp. of Baltimore, 19 BRBS 233 (1987).

Yet, as discussed below in detail, two parties are responsible for the scheduled award entered in this matter. Accordingly, it seems that each must be accorded a share of the credit proportionate to the number of weeks each is responsible for the scheduled 50% left lower extremity disability. To accomplish this, the Employer will be permitted to take a credit equal to the total dollar amount Claimant previously received under the schedule for his pre-existing 30% disability of the left lower extremity divided by the total number of weeks he receives compensation under the schedule for his current 50% left lower extremity disability multiplied by 104; and the Special Fund shall be entitled to the remainder of the credit.

Section 8(f) Relief

Prior Proceedings

Finally, Employer petitions for relief under Section 8(f) of the Act. The director denied the petition on ground that Employer has failed to demonstrate that the degree of permanent disability is materially and substantially greater than it would have been in the absence of Claimant's pre-existing disability. In his post-hearing brief, the director notes that: "Under the Longshore Act's aggravation rule, if an employment injury aggravates, accelerates, exacerbates, contributes or combines with a previous infirmity, disease or underlying condition, the employer is liable for compensation for, not just the disability resulting from the employment injury, but for the employee's total resulting disability." (citations omitted). Dir. Br. at 2. Citing a previous discussion of the issue based upon a prior record, the director quotes Judge Malamphy's observation that: "there is no evidence by any medical expert quantifying the degree to which the claimant would have suffered any whole body impairment in the absence of the claimant's pre-existing

condition." Dir. Br. at 5. Judge Malamphy noted further that Employer failed to show that the degree of permanent impairment was substantially and materially greater than it would have been absent the pre-existing condition because vocational evidence failed to demonstrate: "the degree to which any present diminution of the claimant's wage earning capacity is materially and substantially greater than it would have been in the absence of the preexisting injury." Dir. Br. at 6. In other respects, the director disagrees with Judge Malamphy's Section 8(f) discussion, particularly his conclusion that section 8(f0 applied notwithstanding the fact that Claimant had not reached MMI. Nevertheless, prior alleged errors aside, we consider the issue here *de novo*, and note the prior ruling only to the extent it is raised by the parties.

Director's Opposition

It is the director's position in this proceeding that: "there is nothing in the record that 'quantifies… the level of impairment that would ensue from the Claimant's work-related injury alone,'" and, accordingly, Employer cannot satisfy the "materially and substantially greater than" requirement imposed in Director v. Newport News Shipbuilding and Dry Dock Co. (Harcum I), 8 F.3d 175, (4th Cir. 1993), *aff'd*, 514 U.S. 122, (1995). Dir. Br. at 9. Before addressing the director's contention, and the evidence cited to support it, the other elements of Employer's Section 8(f) defense will be considered below.

Pre-existing Injury

The record shows that, at the time of his February 23, 2001, accident, Claimant suffered from a serious pre-existing, work-related knee injury. Dr. Lucie, on May 3, 1988, reported that Claimant had reached MMI for the prior injury with a 30% permanent partial impairment of the left knee. Although Claimant was able to return to work, an economic loss need not be demonstrated. Director v. Campbell Industries, Inc. 678 F.2d 836 (9th Cir.) cert. denied 459 U.S. 1104 (1982); Hardy, *supra;* Bickham v. New Orleans Stevedoring Co. 18 BRBS 41 (1986), particularly in view of the documented 30% permanent partial impairment rating. *See*, CNA Ins. Co. v. Legrow, 935 F.2d 1424 (1st Cir. 1991); Equitable Equipment Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Mikell v. Savannah Shipyard Co., 26 BRBS 32 (1997). I conclude that this was a serious injury within the meaning of Director v. General Dynamics Corp., 982 F.2d 790 (2nd Cir. 1992), and constituted a pre-existing permanent partial disability.

Manifestation of Pre-Existing Condition

It does not appear that the director challenges the notion that Claimant's pre-existing permanent partial disability was manifest to the Employer as required by the applicable case law. The courts have, of course, held that as long as the pre-existing condition was documented before the second injury, the employer need not have actual knowledge of the pre-existing condition. American Shipbuilding Co. v. Director, 865 F.2d 727 (6th Cir. 1989). Constructive knowledge of the condition is sufficient if the condition was objectively determinable from medical records in existence at the time of the second injury. Director v. Universal Terminal & Stevedoring, 575 F.2d 452 (3rd Cir. 1972). In this instance, Dr. Lucie's medical records and other reports documenting Claimant's injury history and the disability claim Claimant filed are more than sufficient constructive notice of the pre-existing permanent partial disability to satisfy the manifestation requirement of Section 8(f).

New Injury

As noted above, the director denied Section 8(f) relief, but he does not now dispute the fact that Claimant was the victim of a new injury at work on February 23, 2001, or that he reached MMI with a permanent partial disability due to the new injury.

Quantifying Disability

As emphasized by the director, however, to prevail on a Section 8(f) petition, an employer must establish that a claimant's disability is not solely due to the new injury, Two "R" Drilling Co. v. Director, 894 F.2d 748 (5th Cir. 1990), and that it is substantially and materially greater than would have resulted from the new injury alone. Sproull v. Director, 86 F.3d 895 (9th Cir. 1996), cert denied 520 U.S.1155 (1997); Louis Dryfus Corp. v. Director, 125 F.3d 884 (5th Cir. 1997).[8] These are the elements of proof in Employer's defense which caused the Director the greatest difficulty.

In his post-hearing brief, the director noted that Dr. Lucie rated Claimant's current knee impairment at 50% and rated his pre-existing knee impairment at

[8] In Jacksonville Shipyards v. Director, 851 F.2d 1314 (11th Cir. 1988) the court determined that the claimant suffered a natural progression of a pre-existing injury, not a second injury.

30%, but argues correctly that the case law does not permit the conclusion that current accident resulted in a 20% impairment based upon the arithmetic subtraction of the prior rating from the current rating. Emp. Br. at 10-11; *See*, Director v. Newport News Shipbuilding and Dry Dock Co. (Harcum I), 8 F.3d 175, (4th Cir. 1993), *aff'd*, 514 U.S. 122, (1995). As the director contends, the Employer's burden is bit more complex than that.

To establish a defense under Section 8(f), Employer must show the degree of disability that would have resulted from the February 23, 2001 injury, assuming hypothetically that Claimant had no pre-existing disability. Louis Dreyfus Corp. v. Director, 125 F.3d 884, (5th Cir. 1997). Often referred to as the "quantification" test, Employer must thus quantify the level of disability that would have resulted from the current work-related injury, alone, in order to demonstrate that the current condition is not due solely to the current injury. Harcum I. Thus, the courts have determined that an employer must present evidence of the type and extent of the disability that claimant would have suffered had he not been disabled at the time the second injury occurred. Director v. Ingalls Shipbuilding, Inc., 125 F.3d 303, (5th Cir. 1997).[9] The director insists that there is nothing in the record that quantifies the level of impairment that would ensue from 2001 injury alone, and, therefore, Employer has failed to satisfy the Harcum I test.

To be sure, the Board and the court's have deemed it impermissible to subtract Claimant's prior restrictions from his current restriction to determine the contribution to disability caused by the second injury. *See*, Harcum I, *supra*. In Harcum I, the court observed: "[E]mployer did not satisfy the contribution element, as it did not provide quantitative evidence, other than the discredited 'subtraction' method of the disability ensuing from the work injury alone so that it could be determined whether claimant's disability was materially and substantially greater as a result of the pre-existing disability." Newport News Shipbuilding & Dry Dock Co. v. Pounders, 326 F.3d 455, (4th Cir. 2003). While Employer actually adopted the impermissible methodology in its brief, subtracting

[9] The degree of certainty in quantifying the disability caused by the second injury alone may depend upon the whether the second injury involves the same body part as the pre-existing injury. For example, the assessment of the level of disability caused by a low back injury to a claimant who has a pre-existing permanent partial disability due to an arm injury involves a considerably different analysis from the Claimant who has a pre-existing permanent partial low back disability to his L4/L5 disc and subsequently sustains an injury to the same disc. Meeting the Harcum I test in the latter situation presents a formidable challenge. In the first example, the physician can evaluate the conditions as they actually exist and assess the impairments as they affect segregated and independent body parts, alone and in combination. In the latter example, in contrast, the physician must first evaluate a hypothetical situation that assumes the second injury occurred in a context devoid of the Claimant's actual medical history, and then quantify how badly a claimant's low back likely would have been disabled had it not been weakened or damaged by the pre-existing condition. Dr. Lucie, the treating physician for both injuries was, in this instance, able to provide the required assessment.

Claimant's 30% pre-existing impairment from his current 50% impairment, Dr. Lucie's evaluation, fortunately for Employer, allows a proper Harcum I analysis.

Thus, unlike the record before Judge Malamphy; on this record, Dr. Lucie did, in fact, quantify the relative contribution of the 2001 injuries. He specifically stated that the 2001 injury resulted in a 2% permanent impairment which "accelerated the need for the knee replacement." The record, therefore, permits the conclusion that February 23, 2001 injury did not cause: "virtually the same level of disability as that manifest in the ultimate permanent partial disability through the contribution of the pre-existing permanent partial disability." Harcum I at 184.

Indeed, as Dr. Lucie made clear at his deposition, Claimant was a candidate for the knee replacement surgery before the February 23, 2001 accident, which only accelerated the need for the surgery. Yet, his testimony demonstrates that it was the combination of the 30% pre-existing permanent partial impairment and the 2% permanent partial impairment attributable to the 2001 injuries that necessitated the acceleration of the knee replacement surgery. Moreover, the record shows that the combination which resulted in the subsequent post-surgery MMI rating of 50% permanent partial left lower extremity impairment rating "materially and substantially" exceeded the 2% disability that would have resulted from the 2001 injuries alone. Harcum I at 185.

The record, of course, contains evidence, other than the impairment ratings, which further demonstrates that Claimant's current disability is materially and substantially greater due to the combination of the pre-existing and current injuries than it would have been as a consequence of the 2001 injuries alone. Prior to the February 23, 2001 accident, Claimant's physical condition did not prevent him from working as a refrigeration mechanic. After the 2001 accident, Claimant struggled to continue working at his usual job, but eventually had to agree to the surgery which he knew would end his career as a refrigeration mechanic. As Dr. Lucie opined, the 2% impairment attributable to the 2001 accident accelerated the need for the surgery which ended Claimant's efforts to continue working at his usual job. Moreover, unlike the record before Judge Malamphy which failed to show any loss of wage earning capacity, this record contains vocational evidence which documents that Claimant, as a result of the combination of pre-existing injury, the February 23, 2001 accident, and the resulting surgery, suffered a sizeable loss of wage earning capacity.

The purpose of Section 8(f) is to alleviate potential employment discrimination against handicapped employees, and Claimant's pre-existing left

knee condition is precisely the type of condition Section 8(f) was designed to address. The evidence is sufficient to determine that Claimant's pre-existing and second injury actually invoke that policy. The courts and the Board have imposed criteria which are prerequisites to triggering the defense; and for all of the reasons discussed above, I conclude that Employer has demonstrated its entitlement to Section 8(f) relief. Accordingly;

ORDER

IT IS ORDERED THAT Employer pay to Claimant compensation for a temporary partial disability based upon a loss of wage earning capacity in the amount of $984.56 per week, commencing August 2, 2004, through October 23, 2005; provided however, that Employer may take a credit for compensation previously paid during this period, but shall pay interest on any compensation that remains due after the credit is taken, and;

IT IS FURTHER ORDERED THAT Employer shall pay Claimant interest on temporary total compensation benefits that accrued during the period January 9, 2003, through November 27, 2004, plus a 10% penalty on the compensation and interest that accrued during this period, and;

IT IS FURTHER ORDERED THAT Employer shall pay Claimant interest on due on the interest awarded in the preceding paragraph, and shall pay a 10% penalty the interest calculated under this paragraph, and;

IT IS FURTHER ORDERED THAT Employer shall pay Claimant compensation for a period of 104 weeks based upon an average weekly wage of $1,304.56 and pursuant to Section 8(c)(2) of the schedule for a 50% permanent partial disability of the left lower extremity commencing as of October 24, 2005, and thereafter, the remainder of Claimant's scheduled award shall be paid by the Special Fund; and provided further that Employer and the Special Fund shall be entitled to a credit equal to the dollar amount Claimant previously received for a 30% scheduled disability of his left lower extremity which shall be shared proportionately by Employer and Special Fund as follows:

> Employer's credit shall be calculated by taking the total dollar amount Claimant received for his prior 30% left lower extremity scheduled award and dividing that amount by the total number of weeks Claimant is entitled to receive compensation under the schedule for his current 50% left lower extremity permanent partial disability; the quotient shall then be multiplied by 104 to determine the amount of

the Employer's credit. The Special Fund shall be entitled to the remainder of the credit up to the total dollar amount of Claimant's prior award.

IT IS FURTHER ORDERED that the claim for a 20% penalty under Section 14(f) of the Act be, and it hereby is, denied.

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Stuart A. Levin
Administrative Law Judge